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Opinion following rehearing

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

JEFFREY A. CONRAD,

Plaintiff and Appellant,

v. **A122252**

MONTGOMERY-SANSOME LP et al., **(San Mateo County Super. Ct. No. 458286)**

Defendants and Appellants.

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Appellant Jeffrey A. Conrad sued his former employer, Montgomery-Sansome LP (Montgomery-Sansome) and one of its partners, Leonard Nordeman (collectively, defendants) for various claims, including breach of contract, unpaid wages, fraud, and wrongful constructive termination in violation of public policy. A jury rendered a verdict for Conrad on all claims and awarded him $1,005,002, which included $450,000 in punitive damages. In an amended judgment, the court entered judgment for Conrad on the claims for breach of contract, wrongful constructive termination, and punitive damages and awarded him $705,001.

Defendants moved for judgment notwithstanding the verdict (JNOV) on Conrad's wrongful constructive termination claim and on punitive damages. Defendants also moved for a new trial on punitive damages. The court denied the JNOV motion but granted the motion for new trial.

Conrad appealed the grant of new trial. Defendants cross-appealed the denial of their JNOV motion. In our original opinion, we concluded the court should have granted defendants' motion for JNOV on Conrad's wrongful constructive termination claim because there is no substantial evidence defendants terminated Conrad or forced him to resign for a purpose that contravened public policy. We also concluded the court should have granted the JNOV motion on punitive damages because, had the court properly granted defendants' JNOV motion on the wrongful constructive termination claim, the judgment would not have provided a basis for an award of punitive damages.

Conrad petitioned for rehearing, claiming this court "reached an erroneous decision because of a mistake of law" and omitted material facts. We granted the petition and vacated our original opinion. On rehearing, we again conclude the court should have granted defendants' JNOV motion on Conrad's wrongful constructive termination claim. We also conclude the court should have granted defendants' motion for JNOV on the issue of punitive damages.

Accordingly, we reverse the JNOV and new trial orders. We remand with directions to grant defendants' JNOV motion on the claims for wrongful constructive termination and punitive damages and to enter the resulting judgment for defendants on both claims.

FACTUAL AND PROCEDURAL BACKGROUND

We summarize only those facts that are relevant to the dispositive issues on appeal.

Montgomery-Sansome is a construction company based in Millbrae. Nordeman owns two percent of the company and runs the business. His two sisters own the remaining 98 percent of the company. Conrad began working at Montgomery-Sansome in 1998. Initially, he performed "office administration [ ] work" but he later became a project manager. While Conrad worked at Montgomery-Sansome, he believed he would become a partner in the company. In 1999, Montgomery-Sansome had four employees and gross revenues of "around $500,000 or less." When Conrad left the company in

March 2006, Montgomery-Sansome had 22 employees and gross revenues of "[a] little over three million" dollars.

At some point during his employment, Conrad began loaning money to Montgomery-Sansome to help the company pay for materials and employee salaries. Over the course of nine years, Conrad loaned Montgomery-Sansome approximately $75,000. This created financial strain for Conrad, particularly because Montgomery-Sansome was not paying Conrad all of his salary or commissions. Conrad complained to his wife that he had "carried credit card debts . . . for Montgomery-Sansome" to "keep the business afloat . . . to pay the administration staff and . . . keep[ ] the business running." Nordeman promised, repeatedly, to repay Conrad. If Conrad had known Nordeman did not intend to pay him, Conrad would not have continued to work for Montgomery-Sansome.

The Termination of Conrad's Employment

In late March 2006, Conrad was at home preparing to leave for vacation when he received a telephone call from Nordeman. Nordeman had just returned from his own vacation and wanted Conrad to update him on various projects. Nordeman asked Conrad to come into the office the following day; Conrad complied, but Nordeman did not come to the office.

The following day, Nordeman called Conrad at home and said, "'I need you to come in [to the office]. You can't just crawl into a hole over there and just disappear. You have to come in and deal with me and this job right now.'" Conrad reminded Nordeman he was on vacation and could not come to the office a second time. In response, Nordeman yelled a profanity at Conrad and hung up on him. When the phone call ended, Conrad told his wife, "'I can't believe this. I think I just got fired.'"

On March 23, 2006, Nordeman sent Conrad the following email: "Dear Jeff, we have worked together successfully for almost nine years, but it looks like we may not be able to work together any longer. . . . Absent your sincere apology and promise to improve, we will just part friends. I will even help you with whatever you want to do next." When Conrad received the email, he believed his employment at Montgomery-

Sansome had ended and that he and Nordeman were "just going to part ways." Conrad felt that there were "so many things that were going on. [He] hadn't been paid. And the job responsibilities were so far above [his] ability and head. And [Nordeman] wasn't there to deal with them."

Later that evening, Conrad responded to Nordeman's email. In his email, Conrad wrote, "'Your offer to assist in my transition to a new career is accepted. The best way you can help is to pay me my back pay due in full, nearly $50,000, and clear all debts.'" Conrad informed Nordeman that he would prepare a final accounting by March 31, 2006. Conrad felt his "future had been ripped out from underneath" him. He explained, "I was going to be a partner in this business. I had been working hard at it almost 70 hours a week. And [the business] had been growing. And it was getting to the edge of being successful. And then that had just been yanked out from under me over the fact that I wasn't going to come in on my own vacation to . . . I just don't know what."

On March 31, 2006, Conrad presented Nordeman with an invoice for $84,487.98, the amount Conrad believed Nordeman owed him for materials, reimbursements, and commissions. After discussing the invoice with Conrad, Nordeman agreed to pay Conrad $75,000. Shortly thereafter, Conrad began working as a project manager for Wesco General Contracting, a rival construction company run by Nordeman's son. Nordeman did not pay Conrad $75,000.

Conrad's Lawsuit

In October 2006, Conrad sued defendants for breach of contract, unpaid wages, fraud, wrongful constructive termination in violation of public policy, and intentional infliction of emotional distress. The operative first amended complaint alleged defendants failed to pay Conrad "unpaid wages and reimbursements," induced him to loan money to Montgomery-Sansome, and "refused and failed" to pay the money owed. Conrad's wrongful constructive termination cause of action alleged Nordeman fired him because he insisted "defendants abide by the promise to fully compensate him for service rendered" and "comply with applicable law." Finally, the complaint alleged Nordeman

breached a contract to repay Conrad $75,000 in commissions. Conrad sought compensatory and punitive damages.[1]

The Verdict and Post-Trial Proceedings

In February 2008, a jury rendered a verdict in favor of Conrad on all of his claims and awarded him $1,005,002 in damages, $450,000 of which represented punitive damages. In an amended judgment filed in May 2008, the court struck the damages for unpaid wages, fraud, and intentional infliction of emotional distress. The court entered judgment for Conrad on the claims for: (1) breach of contract; (2) wrongful constructive termination in violation of public policy; and (3) punitive damages. The court awarded Conrad a total of $705,001.

Defendants moved for JNOV on various claims, including the wrongful constructive termination and punitive damages. Defendants contended they were entitled to JNOV on the wrongful constructive termination claim because there was "***no*** evidence that any breach of public policy caused [Conrad's] termination. . . ." (Original italics.) Regarding punitive damages, defendants argued Conrad "did not adduce evidence at trial showing the [d]efendants' financial condition justified imposition of substantial punitive damages. . . ." Defendants pointed to evidence that: (1) Montgomery-Sansome reported a tax loss in 2006; (2) Montgomery-Sansome's principal asset was "mortgaged to the hilt;" and (3) Nordeman owed money to the Internal Revenue Service and had a zero net worth. The court denied the JNOV motion as to these claims.

Defendants also moved for a new trial on punitive damages.[2] They argued the evidence of their financial condition did not permit an award of punitive damages and the award was disproportionate to their ability to pay. At a hearing on defendants' new trial

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[1] Defendants filed a cross-complaint against Conrad seeking damages for breach of contract and fraud. The jury returned a verdict against defendants and for Conrad. The judgment on that action is not before us.

[2] In their notice of motion for new trial, defendants indicated they were moving for a new trial on all seven grounds set forth in Code of Civil Procedure section 657, but the memorandum of points and authorities in support of their motion addressed only one ground: the purported excessiveness of the punitive damages.

motion on May 23, 2008, the court addressed Nordeman's claims separately from Montgomery-Sansome's. The court granted a new trial on punitive damages as to Nordeman because "there was no evidence necessary to [ ] support the verdict." The court then addressed Montgomery-Sansome's motion for new trial on punitive damages. It expressed its concern over "the paucity of evidence that was admitted to support [the] verdict" against Montgomery-Sansome and proposed denying Montgomery-Sansome's new trial motion if Conrad accepted a substantial reduction in punitive damages. On May 27, 2008, Conrad's counsel rejected the court's proposal.

That same day, the court entered a minute order describing its oral pronouncement on May 23, 2008 and Conrad's rejection of its proposal to reduce the punitive damages award on May 27, 2008. The minute order provided:

"Counsel argue as to Punitive damages as to Mr. Nordeman. The motion is granted as to Punitive damages as to Mr. Nordeman. Court and counsel discuss the date of May 27, 2008 as the day the Court loses jurisdiction [to rule on the new trial motion]. . . . Court and counsel discuss Punitive damages as to Montgomery-Sansome. The Court stated Punitive damages as to Montgomery-Sansome will be reduced in lieu of a new trial [to] $5,000. [Conrad] shall contact the Court on Tuesday, May 27, 2008 if his client agrees. If [Conrad] agrees then [ ] the new trial shall be waived against Mr. Nordeman individually. If [Conrad] does not agree[,] then a new trial against Mr. Nordem[a]n and Montgomery-Sansome as to Punitive damages will be granted. . . .

"[At] 3:30 p.m. [on March 27, 2008], [Conrad's counsel] notified the Court and indicated that he has not heard from his client. Therefore, he has no authority. Motion for new trial as to Mr. Nordeman and Montgomery[-]Sansome as to punitive damages granted."

DISCUSSION

We turn first to the court's denial of defendants' JNOV motion on Conrad's claim for wrongful constructive termination in violation of public policy. Defendants argue they were entitled to JNOV on this claim because there was no evidence "showing that any violation of public policy by [defendants] caused Conrad's firing."

The tort of wrongful termination in violation of public policy prohibits an employer from terminating an employee "'for an unlawful reason or a purpose that contravenes fundamental public policy.'" (*Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127, 1138-1139, quoting *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1094, overruled on another ground in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80, fn. 6.)

Not every dispute between an employer and employee implicates public policy; the public policy allegedly implicated must satisfy four criteria. First, "[t]he public policy that is violated must be one that is delineated by constitutional, statutory, or regulatory provisions. [Citations.]" (*Jersey v. John Muir Medical Center* (2002) 97 Cal.App.4th 814, 821.) "Second, the policy must be 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be 'fundamental" and "substantial.'"[3] (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 890, fn. omitted.)

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[3] Defendants do not contend the public policies at issue here — various provisions of the Labor Code requiring prompt payment of wages — do not meet the criteria set forth above. (See *Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1147 (*Gould*) ["prompt payment of wages due an employee is a fundamental public policy of this state," citing Labor Code section 201]; *Phillips v. Gemini Moving Specialists* (1998) 63 Cal.App.4th 563, 571.) "Tort claims for wrongful discharge typically arise when an employer retaliates against an employee for '(1) refusing to violate a statute . . . [,] (2) performing a statutory obligation . . . [,] (3) exercising a statutory right or privilege . . . [, or] (4) reporting an alleged violation of a statute of public importance.' [Citation.]" (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1256 (*Turner*), overruled on other grounds in *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 498.) But "[a]n employee whose employment is terminated so that the employer may avoid paying wages or benefits to which the employee was entitled" pursuant to Labor Code section 216, subdivision (a) "may maintain a tort action for wrongful termination in violation of public policy." (3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, § 263, p. 345, citing *Gould*, *supra*, 31 Cal.4th at p. 1146.)

"Proof of an employer's violation of a legislatively based, well established, fundamental and substantial public policy alone is insufficient to support a valid claim" for wrongful termination in violation of public policy. "The employee must also show that a nexus existed between the policy violation and the adverse action taken against him. . . ." (3 Witkin, *supra*, Summary of Cal. Law, § 250, pp. 325-326; see *Gould, supra*, 31 Cal.App.4th at p. 1148 & fn. 3 ["[t]he tort of wrongful discharge is committed if the employee is terminated for 'a *purpose* that contravenes fundamental public policy,'" original italics & citation omitted].)

In his petition for rehearing, Conrad claims we conflated the tort of wrongful termination with wrongful *constructive* termination. He contends he sued defendants for wrongful constructive termination in violation of public policy, not simply wrongful termination in violation of public policy. According to Conrad, he was therefore not required to prove a nexus between the termination of his employment and the public policy violation. We disagree.

Turner, supra, 7 Cal.4th at page 1258, is on point. In that case, the plaintiff sued his former employer, Anheuser-Busch, Inc. (ABI), for, among other things, wrongful constructive discharge in violation of public policy. The plaintiff claimed he was forced to quit his job after he complained about ABI's alleged violations of "'Alcohol, Tobacco, and Firearms laws.'" (*Id.* at pp. 1243, 1257.) The trial court granted ABI's motion for summary judgment on the wrongful constructive discharge claim and the California Supreme Court affirmed. (*Id.* at p. 1244, 1244.)

First, the California Supreme Court addressed the elements of a constructive discharge claim. (*Turner, supra,* 7 Cal.4th at p. 1245.) It explained that a "[c]onstructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say, 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation. [Citation.]" (*Id.* at pp. 1244-1245.)

The *Turner* court continued, "Standing alone, constructive discharge is neither a tort nor a breach of contract, but a doctrine that transforms what is ostensibly a resignation into a firing. Even after establishing *constructive* discharge, an employee must independently prove a breach of contract or tort in connection with employment termination in order to obtain damages for *wrongful discharge*." (*Turner, supra,* 7 Cal.4th at p. 1251, original italics.) The court explained that "a constructive discharge may, in particular circumstances, amount to breach of an employer's express or implied agreement not to terminate except in accordance with specified procedures or without good cause. [Citation.] ¶ Apart from the terms of an express or implied employment contract, an employer has no right to terminate employment *for a reason* that contravenes fundamental public policy as expressed in a constitutional or statutory provision. [Citation.] An actual or constructive discharge in violation of fundamental public policy gives rise to a tort action in favor of the terminated employee. [Citations.]" (*Id.* at p. 1252, italics added; see also *Colores v. Board of Trustees* (2003) 105 Cal.App.4th 1293, 1311 (*Colores*) ["a termination in contravention of a fundamental public policy . . . can constitute a tort"].)

Applying these principles, the *Turner* court held the trial court properly granted summary judgment for ABI on the wrongful constructive discharge claim because the plaintiff "did not establish the required nexus between his alleged 'whistle-blowing' activities in reporting allegedly illegal conduct, and negative reviews of his performance coming four years later." (*Turner, supra,* 7 Cal.4th at p. 1253.) More specifically, the court concluded that the plaintiff's whistle-blower harassment claim failed because he could not "demonstrate the required nexus between his reporting of alleged statutory violations and his allegedly adverse treatment by ABI . . . . ¶ The only reasonable inference from the record . . . is that [the plaintiff's] evaluation reflected a bona fide assessment of his job performance, not a retaliatory blow for reporting alleged illegalities remote in time, place, and context from the evaluation setting." (*Id.* at pp. 1258-1259.)

Turner stands for the proposition that a plaintiff pursuing a claim for wrongful constructive discharge in violation of public policy — like a plaintiff pursuing a claim for

wrongful termination in violation of public policy — must demonstrate a nexus between the discharge and the public policy violation. (*Colores, supra,* 105 Cal.App.4th at p. 1311 ["besides proving *constructive* discharge from employment, a plaintiff must also prove a tort or a breach of a contract, in connection with the termination, that entitles her to damages for *wrongful* discharge." (Original italics.)]; *Gould, supra,* 31 Cal.App.4th at p. 1148, fn. omitted [if the employer discharged the plaintiff "in order to avoid paying him the commissions, vacation pay, and other amounts he had earned, it violated a fundamental public policy of this state"].) We therefore disagree with Conrad's contention that he was not required to establish a link between his constructive discharge and the public policy violation. *Turner* requires Conrad to establish a nexus between the purported intolerable working conditions which caused him to resign and the public policy violation. Conrad makes no attempt to distinguish *Turner*, nor does he contend it was wrongly decided.

Having concluded Conrad must establish defendants constructively discharged him for a purpose that contravened public policy (i.e., to avoid paying him commissions, salary, and other amounts he earned), we now turn to the evidence. In their opposition brief, defendants contended the evidence at trial established Nordeman fired Conrad or forced him to resign *not* to avoid paying him but because the two men disagreed about whether Conrad had to come into work while Conrad was on vacation. In a one-paragraph response in his reply brief, Conrad claimed his "trial testimony established clearly that he was forced to resign for non-payment of wages, in violation of the substantial public policies of this state." To support this argument, Conrad referred us to nine pages of his trial testimony. In our original opinion, we concluded the evidence did not support his argument.

At trial, Conrad testfied Nordeman called him while he was on vacation and demanded he come into the office to answer questions about a construction job Montgomery-Sansome was performing. Nordeman told Conrad, "You have to come in and deal with me and this job right now" and when Conrad refused, Nordeman yelled at Conrad and hung up on him. In response, Conrad told his wife, "'I think I just got

fired.'" Conrad testified that when he received Nordeman's email after their telephone conversation, he believed his employment at Montgomery-Sansome had ended and that he and Nordeman were "just going to part ways." He explained that there were "so many things that were going on. [He] hadn't been paid. And the job responsibilities were so far above [his] ability and head. And [Nordeman] wasn't there to deal with them." Finally, he acknowledged his "future" had "had just been yanked out from under [him] over the fact that [he] wasn't going to come in on [his] own vacation[.]" It was not until after this conversation that Conrad presented Nordeman with a demand to be paid for materials, reimbursements, and commissions. Moreover, Conrad testified he stayed at Montgomery-Sansome despite not getting paid in a timely fashion because he believed he would become a partner in the company. Finally, Nordeman testified that when he sent Conrad the March 23, 2006, email asking him to apologize, he did not have an "ulterior motive." He simply wanted Conrad "to improve. And I wanted him to stay with me. He was like family." Nordeman, explained that he was "[b]lown away" and "hurt" when Conrad responded to his email and quit.

In his petition for rehearing, Conrad claims his decision to resign was "substantially motivated" by defendants' "pervasive, continuous and persistent failure . . . to pay significant amounts in compensation that were owed to him[.]" To support this argument, Conrad refers us to a significant amount of evidence that he did not cite in his opening or reply briefs. We have reviewed this evidence and are satisfied it does not support Conrad's argument that he resigned because defendants failed to pay him money he was owed in violation of various Labor Code provisions.

From the evidence discussed above, we must — even after drawing all inferences in favor of Conrad — conclude there is no substantial evidence to support the jury's verdict on Conrad's wrongful constructive termination claim. There is simply no evidence defendants forced Conrad to resign for a purpose that contravened fundamental public policy, i.e., to avoid paying Conrad commissions and other amounts due. (See, e.g., *Turner, supra,* 7 Cal.4th at p. 1258; *Read v. City of Lynwood* (1985) 173 Cal.App.3d 437, 444 [discharged employee failed to "connect" her termination with a public policy

against bribery].) As a result, we conclude the court should have granted defendants' JNOV motion on Conrad's wrongful constructive termination claim.

And, having reached this result, we must reverse the award of punitive damages. As stated above, the judgment below included findings of liability based on breach of contract and wrongful constructive termination. Had the court properly granted defendants' JNOV motion on the wrongful constructive termination claim, the judgment would have included only a finding of liability based on breach of contract. It is well settled that punitive damages are not available for breach of contract. (Civ. Code, § 3294, subd. (a); *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 392 [reversing punitive damages award where the only ground for liability was breach of contract]; *Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 61 ["[i]n the absence of an independent tort, punitive damages may not be awarded for breach of contract 'even where the defendant's conduct in breaching the contract was willful, fraudulent, or malicious'"].)

Accordingly we need not consider defendants' remaining claims, nor the only issue raised in Conrad's appeal: that the order "which purported to grant" defendants' new trial motion must be reversed because it contained "neither a statement of the ground upon which the new trial was granted, nor any specification of the court's reasons[.]"

DISPOSITION

The orders denying the JNOV motion and granting a new trial are reversed and remanded with directions to the court to: (1) grant defendants' JNOV motion on the claims for wrongful constructive termination and punitive damages; and (2) enter the resulting judgment for defendants on the claims for wrongful constructive termination and punitive damages. Defendants are awarded costs on appeal.

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Jones, P.J.

We concur:

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Simons, J.

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Bruiniers, J.